UPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 752

MILTON FRANK ALLEN PUBLICATIONS, INC.
Petitioner,

vs.

GEORGIA ASSOCIATION OF PETROLEUM RETAILERS, INC.
Respondent.

RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATIONS

None other than those appearing in the Petition and in Brief In Opposition.

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STATEMENT OF THE CASE

Respondent's Statement of the Case adds nothing that is relevant to the only issue before this Court at this stage of the proceedings, to-wit: Did the Supreme Court of Georgia deny due process to the Petitioner? By the same token a good portion of Respondent's argument is addressed either to the merits of the issue of the validity of the membership contract or to collateral matters which the Supreme Court of Georgia has already decided against the Respondent and of which Respondent has never sought review.

I. The Federal Claim Was Timely Raised

In studying pages three and four of Respondent's Reply, it is apparent that Respondent misconceives the basis of Petitioner's affirmative propoundment of this question. Not only do we concede that Petitioner knew of the statute involved (Code of Georgia 22-1864) at the time the initial pleadings were filed, but Petitioner had the same knowledge when the contract in question was executed and ratified in 1946. It was precisely because of and in reliance upon the statute that Petitioner requested and obtained the amendment to Respondent's by-laws (set out verbatim on page ten of the Petition) in order to assure the validity of the contract.

Clearly Petitioner has never questioned, and does not now question, the validity, relevance or efficacy of the statute. Parenthetically, we point out that even though Respondent in its original defenses asserted that the contract was void as against public policy (R. 66), it never took the position either that the Respondent had not ratified the contract in 1946 and acted on it to its manifest advantage for more than a score of years or that the ratification (in the form of the above referred to by-law amendment) was ineffectual to accomplish its intended purposes. It is a safe assumption, therefore, that both parties, unlike the Supreme Court of Georgia, were aware of the existence of this limitation and saw no need to thrash out the question of its effect.

The thrust of Petitioner's argument is not the abstract reference to the statute; it is the application of same in diametric opposition to the undisputed facts in the record.

We submit that the decision in *Bloeth vs. New York*, cited by Respondent at page four of its Brief in Opposi-

tion, a decision of one member of this Court, was based primarily on the fact that one point sought to be raised in this Court had already been passed on by it and that the other was clearly insubstantial as a federal question.

Herndon vs. Georgia, cited at page four of Respondent's Brief in Opposition and at page seven of the Petition, a decision of the full Court, says in relevant part (55 S.C.R. at 795):

> "Petitioner, however, contends that the present case falls within an exception to the rule – namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. **There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it**" (emphasis added) (citing authorities)

and this is precisely what Petitioner contends in the instant case.

Radio Station W.O.W. vs. Johnson, cited at page four of the Brief in Opposition, rests on the proposition that the would-be Petitioner had, in the lower courts, pleaded the reverse of what he later contended to be the federal question.

II. There is a Federal Claim of Substance

By a none-too-subtle process Respondent seeks to dilute the effect of the limitation by calling it a "Resolution" in spite of the by-law's own unequivocal terminology employing the word "amendment." Be that as it may, Respondent then contends, in effect, that unless the contract is set out verbatim in the by-laws and amendments thereto, it is of no value[1]; understandably, no authority is cited for such a proposition.

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[1] The by-law gives the directors plenary power to effectuate the intended purposes of the contract:

> "The Board acting through its President and Treasurer shall be authorized to do and perform each and every other act in connection therewith, which may, in law, be necessary to fully enter into said agreement and carry out or perform the objects of the corporation in connection therewith" (Petition, page 10).

Respondent's correction (Brief in Opposition, page 6) that the by-law was adopted 16 days before the contract was executed is gratefully acknowledged since this reenforces our contention that the execution of the contract was a fulfillment of the by-law's directive – clearly, had this not been so, the directors would not have approved it particularly when, as the Supreme Court of Georgia pointed out in acquitting Petitioner of any suggestion of Mr. Allen's breach of his fiduciary relationship:

> "The proposed contracts were read 'word for word' at the March 26, 1946, meeting of the Association's board of directors, were held over for further study, were considered again and acted upon favorably at the April 11, 1946, board meeting by a vote of 11 to 2. Thereupon the president and the treasurer of the Association executed them on behalf of the corporation. No fraud, bad faith, unfairness or irregularity whatever appears as to their consideration and execution." (Appendix, Page 21, last paragraph.)

Headnote 5 of *Hornday vs. Goodman*, cited by Respondent at Page 6 of its Brief in Opposition, reads in part:

> "Whether any given rule of action becomes a by-law or is a mere resolution depends upon the solemnity with which it is passed."

The above quotation from the Supreme Court of Georgia's opinion together with the recording of two negative votes on the adoption of the contract is a fair indication of due deliberation and solemnity.

While we do not necessarily quarrel with Respondent's statement that a by-law is "a permanent and continuing rule," it is hard to square this contention with Respondent's lamentation about a potential 90-year life of the contract. There is nothing in the wording of the amendment to indicate that it was to have any less permanent effect than any of the other by-laws.

We fail to understand Respondent's argument that "even if considered as a 'by-law' the action of the Board of Directors did not authorize an invalid contract," since this has to be arguing in a circle. The contract (according to Georgia Code 22-1864 and the Supreme Court of Georgia's interpretation, see Appendix 24 and 25) derives its validity from being adopted and approved by means of a charter or by-law amendment; thus approved it is valid; to say it is still not valid is to deny the clear authority of Code 22-1864 authorizing limitations of this nature.

Respondent persists in saying (e.g., Brief in Opposition, Page 7) that "the contract disposed of the association's right to solicit membership," etc.; that is utterly misleading. The purpose of the contract was to "delegate", not to "dispose of," the right to membership solicitation. This "right" carried with it not only a responsibility, as is usually the case, but also a heavy burden of risk and cost (paid by Petitioner out of the 75% it retained; see Petition, page 4, second full paragraph). The record shows that the Respondent's faith in Petitioner's ability to discharge this responsibility was well founded.[2]

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[2] See Petition, page 11, first full paragraph and the record references therein noted. Respondent overlooks the mathematical axiom that 75% of nothing is still nothing. In terms of membership and dues receipts the Respondent was a mere shell at the time this contract was executed (R. 571, 573).

Article III of Respondent's charter provides ". . . no capital stock will be issued"; Code 22-1870 (page 8, Brief in Opposition) is therefore inapplicable; Code 22-1881 does not make Code 22-1870 applicable in this situation.[3]

Myrick vs. Hoimes and *Chatfield vs. Dennington* (Brief in Opposition, page 8) both deal with unincorporated associations.

The only extent to which the amendment made "an altogether new and different kind of society" out of the Respondent was the transmutation from a dormant, inactive and moribund organization just prior to the adoption of this contract into a dynamic, purposeful and peerless force in the petroleum industry, commanding national attention–scarcely a matter of complaint; see footnote 2.

The argument "that a non-profit corporation could not, by an amendment to its by-laws, devote its principal income and sources of income to an individual's private gain" fails for three reasons:

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[3]Two other points bear mentioning relative to the adoption of the by-law in question: (a) Article X of the original by-laws adopted in 1941 provides:

"Amendments

These by-laws may be amended at any regular meeting of the board of directors by a vote of a simple majority of those present and voting either in person or by proxy or at any special meeting of the board of directors by a two-thirds majority of those so present and so voting." (R. 1087).

(b) at the April 11, 1946 meeting at which the contracts (both membership and publication) were ratified, Respondent had an attorney available to it for consultation but did not avail itself of his services. (R. 263).

(a) As previously stated, but for the Petitioner's efforts there would not have been such an income.

(b) Petitioner's receipts were *gross*, out of which substantial promotion, solicitation by several traveling salesmen, office and clerical expenses had to be paid whereas Respondent's receipts were not only *net* but Respondent received office space and facilities from Petitioner without charge. Respondent received also the priceless value of a large membership; indeed "the pearl of great price" with which to achieve its chartered purposes.

(c) As a matter of principle, the membership contract was no more for an individual's personal gain than was the publication contract (whose term was concurrent with the membership contract) which the Supreme Court of Georgia upheld as valid (Appendix, Page 22) against the Respondent's attacks.

Respondent's simplistic argument that "one Board of Directors did not have the authority to bind all subsequent boards of directors" is untenable to the extent that contract obligations are involved. Were it otherwise, no one could safely contract with any corporate or governmental structure.

> "The power to amend, however, is a power to regulate within reasonable bounds, but not to destroy contract rights of the members of the corporation; it is not a power to disturb vested rights. . . . by-laws in the nature of a contract which are designed to vest property rights in the stockholders or others cannot be repealed or changed without the consent of the parties whose rights are affected." 18 Am Jur 2d Corporations, Section 170, Page 701.

CONCLUSION

For the reasons stated in the Petition and, since as demonstrated above, the Brief in Opposition is not supported by reason, principle or authority, Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

Copies mailed to opposing Counsel as per Certificate of Service on file.